ANIMAL PROTECTION INSTITUTE OF AMERICA

IBLA 92-222 Decided October 18, 1992

Appeal from a decision of the Boise, Idaho, District Office, Bureau of Land Management, approving a proposal to remove 87 wild, free-roaming horses from the Owyhee Desert Herd Management Area. EA 91-188.

Reversed.

1. Appeals: Generally--Rules of Practice: Appeals: Dismissal--Rules of Practice: Appeals: Notice of Appeal--Rules of Practice: Appeals: Timely Filing

   An appeal will not be dismissed as untimely if the record transmitted with the appeal fails to establish that the decision from which the appeal is taken was served upon appellant in accordance with 43 CFR 4.401(c) more than 30 days prior to the filing of the notice of appeal or that appellant had actual notice of the decision for more than 30 days before notice of appeal was filed.

2. Appeals: Generally--Rules of Practice: Appeals: Generally--Rules of Practice: Appeals: Service on Adverse Party

   Facsimile transmission of a document does not comply with the service requirements of 43 CFR 4.401(c).

3. Wild Free-Roaming Horses and Burros Act

   The decision to remove wild horses from an area of the public lands is properly reversed where the record fails to establish that the horses are excess; that is to say, that removal of the horses is necessary to establish a thriving natural ecological balance.

APPEARANCES: Nancy Whitaker, Animal Protection Institute of America, Sacramento, California, for appellant; Robert S. Burr, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Boise, Idaho, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

On August 2, 1991, the Boise, Idaho, District Office, Bureau of Land Management (BLM), issued a letter "proposing to gather approximately 87 wild horses from the Owyhee Herd Management Area beginning on or about September 11, 1991." Included with the letter were a 1991 update of the Owyhee Herd Management Area plan, Environmental Analysis (EA) 91-188, a gathering plan, corral management plan, and safety plan for the gather. The letter advised addressees who wished to comment on this proposed action to submit their comments no later than September 2, 1991.

On August 19, 1991, BLM received a letter from the Animal Protection Institute of America (APIA) opposing removal of the 87 "excess" wild horses from the Owyhee Herd Management Area. BLM responded by letter dated September 6, 1991, adopting some of APIA's suggestions but indicating that the removal would proceed. By letter dated October 3, 1991, and received on October 10, 1991, APIA filed an appeal from BLM's decision.

BLM has moved to dismiss APIA's appeal as untimely because it was filed more than 30 days after the EA and a finding of no significant impact were issued by BLM on July 30, 1991. Had July 30 been the decision date, however, BLM would have been obliged to treat APIA's letter received on August 19 as a timely notice of appeal. James C. Mackey, 96 IBLA 356, 362, 94 I.D. 132, 136 (1987); Buck Wilson, 89 IBLA 143 (1985). BLM's motion overlooks the fact that the August 2 letter transmitting information to APIA stated that the action described was a "proposal" and provided a 30-day comment period. Under 43 CFR 4.450-2, APIA's comments about the proposed action amounted to a protest, and BLM's letter of September 6, 1991, became BLM's final disposition of the protest and thus constituted the decision that was subject to appeal.

Under 43 CFR 4.411(a), APIA's notice of appeal was due 30 days after the date of service of BLM's September 6 decision. The notice of appeal indicates that it was transmitted less than 30 days after the date of the decision and received within 10 days thereafter. Therefore, if the notice of appeal was not timely received, it was nonetheless subject to the grace period provided by 43 CFR 4.401(a). Accordingly, BLM's motion to dismiss the appeal as untimely is denied.

[1] The reason why our ruling on the timeliness of APIA's appeal is somewhat ambiguous is that BLM has not established the date on which the September 6 decision was served. Since Mobil Oil Exploration & Producing Southeast, Inc., 90 IBLA 173 (1986), we have held that an appeal will not be dismissed as untimely if the record transmitted with the appeal fails to establish that the decision from which the appeal is taken was served upon an appellant in accordance with 43 CFR 4.401(c) more than 30 days prior to the filing of the notice of appeal. See Southern Utah Wilderness Alliance, 122 IBLA 6, 9 (1991); Humane Society of Southern Nevada, 119 IBLA 216, 217 (1991). That regulation provides as follows:

> (c) Service of documents. (1) Wherever the regulations in this subpart require that a copy of a document be served upon a

person, service may be made by delivering the copy personally to him or by sending the document by registered or certified mail, return receipt requested, to his address of record in the Bureau.

> (2) In any case service may be proved by an acknowledgment of service signed by the person to be served. Personal service may be proved by a written statement of the person who made such service. Service by registered or certified mail may be proved by a post-office return receipt showing that the document was delivered at the person's record address or showing that the document could not be delivered to such person at his record address because he had moved therefrom without leaving a forwarding address or because delivery was refused at that address or because no such address exists. Proof of service of a copy of a document should be filed in the same office in which the document is filed except that proof of service of a notice of appeal should be filed in the office of the officer to whom the appeal is made, if the proof of service is filed later than the notice of appeal.
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> (3) A document will be considered to have been served at the time of personal service, of delivery of a registered or certified letter, or of the return by post office of an undelivered registered or certified letter.

[2] Although BLM states that it "faxed" its response to appellant's comments on September 6, 1991, facsimile transmission of a document does not constitute service under the above regulation. Cf. Reed Gilmore (On Reconsideration), 107 IBLA 37 (1989), aff'd, Gilmore v. Lujan, 947 F.2d 1409 (9th Cir. 1991). The Board will grant a motion to dismiss an appeal as untimely if the party moving for dismissal can demonstrate that the authorized agent of an appellant had actual notice of the decision and failed to file a notice of appeal within 30 days of the date of such actual notice. See Nabesna Native Corporation (On Reconsideration), 83 IBLA 82 (1984); Consolidation Coal Co., 87 IBLA 296 (1985). A motion to dismiss will be denied, however, if there is no evidence in the record to show when an appellant who is not served a copy of a decision had actual notice of it. Sharon Long, 83 IBLA 304 (1984).

The record contains no acknowledgement by appellant of when it received notice of BLM's decision. A copy of the letter attached as an exhibit to APIA's appeal suggests that the fax transmission was made at 5 p.m. on September 6, 1991, a Friday. Although this means of service does not comply with 43 CFR 4.401(c)(1), it may be argued that APIA's notice of appeal implicitly constitutes acknowledgement that the decision was received. See 43 CFR 4.401(c)(2). Because the document was "faxed" on September 6, this line of argument concludes that September 6 must be the date on which notice was provided. This conclusion is only an assumption, however, for which there is no factual support in the record. Unlike the delivery of a certified letter, a fax transmission generates no evidence that notice was actually given, nor does any regulation impute constructive notice to a facsimile transmission to establish the date when the 30-day appeal period

is to begin. If delivery of a certified letter at a place of business was attempted so late on a Friday afternoon that no one was present to receive it, delivery could not be effected until the next business day. Because there is no evidence when APIA had actual notice of BLM's September 6 decision, we cannot consider the appeal to be untimely.

Under 43 CFR 4.21(a), BLM was obliged to refrain from taking action during the 30-day period while an appeal could be filed. Under that same regulation, BLM was obliged to refrain from acting until the appeal taken was resolved, unless BLM filed a motion to have its decision put into effect and such a motion was granted by this Board. Nevertheless, removal of horses began on September 11 and ended on September 16, while the appeal period was still running. Because this violation of the Department's appellate regulations accomplished the proposed action before APIA could be heard, BLM now moves that we dismiss this appeal as moot. We have previously held that an appeal will not be dismissed as moot even though the challenged action has occurred, if issues raised by the appeal are capable of repetition, and failure to decide the appeal would cause substantial issues to evade review. Southern Utah Wilderness Alliance, 114 IBLA 326, 329 (1990); Southern Utah Wilderness Alliance, 111 IBLA 207 (1989); Colorado Environmental Coalition, 108 IBLA 10 (1989). Given that wild horse roundups in the Owyhee area are regularly repeated events, the issues presented in this appeal are capable of repetition. Accordingly, BLM's motion to dismiss this appeal on grounds of mootness is denied. 1/

Section 3(b)(2) of the Wild Free-Roaming Horses and Burros Act (WFRHBA), 16 U.S.C. § 1333(b)(2) (1988), provides the statutory authority for removal of excess wild free-roaming horses and burros from the public range. Specifically, the statute provides that where the Secretary of the Interior determines on the basis of information available to him

> that an overpopulation exists on a given area of the public lands and that action is necessary to remove excess animals, he shall immediately remove excess animals from the range so as to achieve

1/ BLM has recently amended Departmental regulation 43 CFR 4770.3 to provide that an authorized officer may place a removal decision into full force and effect regardless of an appeal. 57 FR 29654 (July 6, 1992). In doing so, BLM provided the following explanation why such action would not render appeals moot:

"If, upon appeal, the IBLA were to subsequently rule that a BLM removal action was incorrect, there are at least two courses of action for mitigating the effects of erroneously removing animals. First, a similar number of animals from another herd area could be moved to the area where the animals were removed in error. Second, as suggested by the IBLA in its decision in Animal Protection Institute of America, et al, 118 IBLA 63 (1991), future removals could be deferred until the herd size increases through normal reproduction and population levels again are consistent with maintenance of a thriving ecological balance." Id. at 29652.

appropriate management levels. Such action shall be taken * * * until all excess animals have been removed so as to restore a thriving natural ecological balance to the range, and protect
the range from the deterioration associated with overpopulation.

16 U.S.C. § 1333(b)(2) (1988). "[E]xcess animals" are defined in the Act as wild free-roaming horses and burros "which must be removed from an area in order to preserve and maintain a thriving natural ecological balance
and multiple-use relationship in that area." 16 U.S.C. § 1332(f) (1988).

As the court stated in Dahl v. Clark, 600 F. Supp. 585, 594 (D. Nev. 1984), "the benchmark test" for determining the suitable number of wild horses on the public range is "thriving ecological balance." In the
words of the conference committee which adopted this standard: "[T]he
goal of wild horse and burro management * * * should be to maintain a thriving ecological balance between wild horse and burro populations, wildlife, livestock, and vegetation, and to protect the range from the deterioration associated with overpopulation of wild horses and burros." H.R. Conf. Rep. No. 1737, 95th Cong., 2d Sess. 15, reprinted in 1978 U.S. Code Cong. & Admin. News 4069, 4131.

In Dahl v. Clark, supra, grazing permittees sought a court order requiring the Secretary to reduce wild horse populations to 1971 levels. Although the court found the range to be substantially over used, the court refused to require removal of horses to that number because it had
not been shown that all those horses were excess within the meaning of
the statute. Because the plaintiffs did not seek removal of any different number of horses that could be considered excess, no removal was ordered.

Since 1989, the Board has issued a number of decisions concerning the gathering of wild horses. In our earlier decisions, we set aside BLM decisions proposing removals merely based on horse population numbers existing at the time land-use plans were originally adopted, holding that a determination that removal of wild horses is warranted must be based on research and analysis, and on monitoring programs involving studies of grazing utilization, trend and range condition, actual use, and climatic factors. Animal Protection Institute of America, 116 IBLA 239 (1990); Craig C. Downer, 111 IBLA 332 (1989); Animal Protection Institute of America, 109 IBLA 112 (1989). Following issuance of those decisions, various BLM offices issued new decisions and we affirmed those removals found to be predicated on analysis of current data regarding grazing utilization, trend and range condition, actual use, and other factors that demonstrated the removals were necessary to restore the range to a thriving, natural ecological balance
and prevent a deterioration of the range in accordance with section 3(b)
of the WFRHBA, as amended, 16 U.S.C. § 1333(b) (1988). Animal Protection Institute of America, 117 IBLA 208 (1990); Animal Protection Institute of America, 117 IBLA 4 (1990); see also Animal Protection Institute of America, 122 IBLA 290 (1992); Animal Protection Institute of America, 118 IBLA 20 (1991). In recognition of the inevitable conflict between wild horse use and livestock use, some BLM offices have prepared final multiple-use decisions that include a livestock management decision and a wild horse and

burro management decision. E.g., Animal Protection Institute of America, 118 IBLA 345 (1991).

Unfortunately, contrary to BLM's assurance that "all subsequent BLM decisions have been consistent with" Animal Protection Institute of America, 109 IBLA 112 (1989), 57 FR 29522 (July 6, 1992), the instant appeal takes
us back to the beginning again. In this case, BLM has simply selected the 1971 wild horse population level as the appropriate management level and periodically removes horses above that number. See EA at 1; 1991 Gathering Plan at 1; Owyhee Herd Management Area Plan 1991 Update at 1-2. In Animal Protection Institute of America, 118 IBLA 20 at 26-27, we explained the distinction between the early and later cases:

> We find this case to be distinguishable in certain respects from those prior cases where horse gather decisions based on horse population numbers existing at the time land use plans were generated were set aside and remanded. Those decisions were set aside because the decisions adopted the planning document numbers as appropriate management levels, rather than as a starting point for monitoring purposes, and the record failed to support a finding that an excess number of wild horses was present or that removal was necessary to restore a thriving natural ecological balance and protect the range from deterioration associated with overpopulation. See Craig C. Downer, 111 IBLA 332 (1989); Animal Protection Institute of America, 109 IBLA 112 (1989). However, the record in the present case reflects substantial monitoring of usage of the public lands by wild horses and livestock and of the condition of the range in terms of forage utilization.

We recognize that BLM believes that periodic removals are necessary to maintain the current acceptable condition of the range. But even where range conditions have been in decline, the Board has not always affirmed horse removal decisions based on proportionate reductions in livestock and wild horse use. Although we found that it was proper to include horses in a proportionate reduction where the conditions of over use could be traced to wild horse use in Animal Protection Institute of America, 118 IBLA at 20, we refused to affirm a gather proposal based on a proportionate reduction
of livestock and wild horse use where the case record did not support the conclusion that wild horse use in that area contributed significantly to overgrazing. Id. at 28-29.

[3] The decision under review must therefore be reversed, because BLM has not demonstrated that the number of horses to be removed is "excess" within the meaning of the statute. Dahl v. Clark, supra; Craig C. Downer, supra; Animal Protection Institute of America, 109 IBLA 112 (1989). We expect future gathers in the Owyhee Wild Horse Herd Area will be deferred until adequate research and analysis and monitoring have demonstrated appropriate management levels to maintain a thriving natural ecological balance and multiple-use relationship in that area. Id.; note 1, supra.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed.

Franklin D. Arness
Administrative Judge

I concur:

Will A. Irwin
Administrative Judge